

ORIGINAL

COMMISSIONERS
KRISTIN K. MAYES – Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

OPEN MEETING ITEM



0000107735

ARIZONA CORPORATION COMMISSION

DATE: JANUARY 28, 2010

DOCKET NO.: T-20667A-09-0179

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette B. Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

AGL NETWORKS, LLC
(CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

JANUARY 28, 2010

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

FEBRUARY 18, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission

DOCKETED

JAN 28 2010

DOCKETED BY	
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ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 KRISTIN K. MAYES - Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

8 IN THE MATTER OF THE APPLICATION OF
9 AGL NETWORKS, LLC FOR APPROVAL OF A
10 CERTIFICATE OF CONVENIENCE AND
11 NECESSITY TO PROVIDE POINT-TO-POINT
12 PRIVATE LINE TELECOMMUNICATIONS
13 SERVICES IN ARIZONA.

DOCKET NO. T-20667A-09-0179

DECISION NO. _____

OPINION AND ORDER

14 DATE OF HEARING:

December 17, 2009

15 PLACE OF HEARING:

Phoenix, Arizona

16 ADMINISTRATIVE LAW JUDGE:

Yvette B. Kinsey

17 APPEARANCES:

Mr. Norman B. Gerry, FRIEND, HUDAK & HARRIS,
LLP, on behalf of Applicant; and

Ms. Robin R. Mitchell, Staff Attorney, Legal Division,
on behalf of the Utilities Division of the Arizona
Corporation Commission.

18 **BY THE COMMISSION:**

19 On April 14, 2009, AGL Networks, LLC ("AGL" or "Company") filed with the Arizona
20 Corporation Commission ("Commission") an application for a Certificate of Convenience and
21 Necessity ("CC&N") to provide point-to-point private line telecommunications services in Arizona
22 and requesting that its proposed services be classified as competitive.

23 On June 25, 2009, AGL filed an amended and restated application ("Amended Application")
24 and amended proposed tariffs clarifying that AGL is seeking a CC&N to provide both local and long
25 distance private line communications services within the state of Arizona.

26 On July 21, 2009, AGL filed a second amended application to include the revisions requested
27 by the Commission's Utilities Division ("Staff").

28 On September 22, 2009, Staff filed a Staff Report recommending approval of the application,
subject to certain conditions.

On November 3, 2009, a Procedural Order was issued setting the hearing in this matter for December 17, 2009, establishing other procedural deadlines.

On November 18, 2009, AGL docketed its Affidavit of Publication showing notice of the application and hearing date had been published in the *Arizona Business Gazette*, a weekly newspaper of general circulation in the proposed service area, on November 12, 2009.

On December 17, 2009, a full public hearing was held before a duly authorized Administrative Law Judge ("ALJ") of the Commission at its offices in Phoenix, Arizona. AGL and Staff appeared through counsel and presented testimony and Staff also presented evidence. No members of the public appeared to give public comments on the application and at the conclusion of the hearing the matter was taken under advisement pending submission of a Recommended Opinion and Order to the Commission.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. AGL is a wholly owned subsidiary of AGL Resources Inc.¹ AGL is a foreign limited liability company, organized under the laws of Delaware, with headquarters in Atlanta, Georgia. AGL is authorized to transact business in Arizona and is in good standing with the Arizona Corporation Commission.²

2. On June 25, 2009, AGL filed an amended application with the Commission to provide both local and long distance point-to-point high capacity private line telecommunications services in Arizona.³

3. AGL's amended application proposes to provide non-switched, facilities-based private line, facilities-based point-to-point, point-to-multipoint, and multipoint-to-multipoint service to business customers in Arizona.⁴ As part of its services, AGL will provide both intra-exchange and

¹ AGL Resources, Inc., is a energy services holding company whose principal business is the distribution of natural gas in six states: Georgia, Virginia, Tennessee, Maryland, New Jersey, and Florida. (Application, Attachment D)

² Amended Application, Attachment A.

³ Amended Application, pg. 1.

⁴ Amended Application, Attachment E.

1 interexchange services for the provision of voice, data, and information services using dark fiber⁵ and
 2 last mile dedicated lines to connect various locations.⁶ AGL proposes to deploy its fiber optic
 3 network throughout Arizona to serve business customers.⁷

4 4. Staff recommends approval of AGL's application for a CC&N to provide intrastate
 5 local and long distance point-to-point private line telecommunications services in Arizona and
 6 recommends that AGL's proposed services be classified as competitive.

7 5. Staff further recommends that:

- 8 a. AGL comply with all Commission Rules, Orders, and other requirements
 relevant to the provision of intrastate telecommunications services;
- 9 b. AGL abide by the quality of service standards that were approved by the
 Commission for Qwest in Docket No. T-01051B-93-0183;
- 10 c. AGL be required to notify the Commission immediately upon changes to the
 Applicant's name, address, or telephone number;
- 11 d. AGL cooperate with Commission investigations including, but not limited to,
 customer complaints;
- 12 e. AGL's proposed rates be classified as competitive.
- 13 f. AGL's fair value rate base information, as provided to Staff, not be given
 substantial weight in this analysis; and
- 14 g. AGL be authorized to discount its rates and service charges to the marginal
 cost of providing the services.

15
 16 6. Staff recommends that AGL docket conforming tariffs for each of its proposed
 17 services within 365 days from the date of an Order in this matter, or 30 days prior to providing
 18 service, whichever comes first. The tariffs submitted to the Commission should coincide with the
 19 services described in AGL's amended application.

20 7. Staff further recommends that, if AGL fails to comply with the above conditions,
 21 AGL's CC&N should be considered null and void, after due process.

22 **Technical Capabilities**

23 8. According to AGL's amended application, the Company's top five executives have a
 24 combined total of more than 100 years experience in the telecom and business industry.⁸

25
 26 ⁵ AGL's proposed tariff defines Dark fiber as strands of fiber optic cable that connect two points within the Company's
 Network, but which strands have not been activated through connection to the electronics that "light" that fiber thereby
 27 enabling it to carry communications services.

⁶ Id.

⁷ Id.

28 ⁸ Amended Application, Attachment F.

1 9. Director of Business Operations for AGL, Mr. Walter A. Harrison, testified that AGL
2 began construction of its fiber network in Arizona in 2002 and currently operates and maintains an
3 approximately 64,000 fiber mile network, connected to 86 establishments and/or buildings in the
4 Phoenix business corridor and surrounding areas, which serves approximately 100 customers. (Tr. at
5 11) According to the Staff Report, AGL's fiber network runs along Interstate 17, and throughout the
6 cities of Tempe, Chandler, Scottsdale, Mesa, and the Town of Paradise Valley. (S.R. at 1)

7 10. AGL's witness testified that AGL plans to provide facilities-based resold competitive
8 intra and inter lateral non-switched services in the Arizona. (Tr. at 11) The witness stated that
9 currently AGL is leasing dark fiber to its customers, but plans are to sell voice data and information
10 services to telecommunications providers and large enterprise businesses using a fiber ring
11 technology. (Tr. at 28.) The fiber ring technology allows two or more laterals to be connected to a
12 ring, and if one side of the network goes down, the product automatically and seamlessly switches to
13 the other side of the ring avoiding any data loss. (Id.) AGL's proposed services will be targeted to
14 large business enterprises like financial institutions, school systems, municipalities, law firms, and
15 large telephone companies, who need to transport data and/or backup data. (Id.) AGL's witness also
16 stated that AGL recently received franchises from the cities of Glendale and Gilbert for dark fiber
17 services. (Id.)

18 11. According to AGL's witness, AGL proposes to offer its services by tariff or on an
19 individual case-by-case basis. (Tr. at 15)

20 12. The Staff Report states that AGL currently has three employees in Arizona who are
21 responsible for sales, engineering, project management, operations, maintenance, and on-site fiber
22 installation. (S.R. at 1) Further, AGL provides 24-hour customer support through its Network
23 Operations Center, located in Atlanta, Georgia. (Id.) According to AGL's witness, the Company's
24 Service Level Agreements typically require AGL to be on site within two hours or less and restore
25 service within four hours, in the event of an emergency outage. (Tr. at 16)

26 13. AGL is authorized and provides similar telecommunications services to those
27 proposed in Arizona, in four other states: Georgia, Nevada, Missouri, and North Carolina. (A-18)

28 14. Staff believes AGL possesses the technical capabilities to provide the services it is

1 requesting in Arizona. (S.R. at 2)

2 **Financial Capabilities**

3 15. According to the Staff Report, AGL provided audited financial statements for AGL
4 Resources, Inc., and its subsidiaries, including AGL. The audited consolidated financial statements
5 show that AGL Resources, Inc. lists total assets of \$6.7 billion; total equity of \$1.6 billion; and a net
6 income of \$217 million for the year ending December 31, 2008. (S.R. at 2) AGL's witness testified
7 that its current fiber network in Arizona represents a net investment of approximately \$35 million.
8 (Tr. at 12)

9 16. AGL will rely on its own financial resources as well as those of its parent company to
10 provide telecommunications services in Arizona.⁹

11 17. AGL's proposed tariffs state AGL may collect advance payments and deposits from
12 its customers.¹⁰ Because AGL's proposed customers will be large telecommunications carriers and/or
13 large businesses, Staff believes that requiring AGL to post a performance bond or irrevocable sight
14 draft letter of credit offers no useful remedy in such a competitive business. (S.R. at 2) Staff's
15 witness further stated that performance bonds or irrevocable sight draft letters of credit are typically
16 used to protect residential customers or small business and in this instance, they provide no remedy
17 because AGL's proposed customers will be able to customize contracts to protect themselves and
18 private line telecommunication services are highly competitive. (Tr. at 36)

19 18. AGL's witness testified that based on the combined financial resources of AGL and its
20 parent company and its parent company's 150 year business history, AGL believes the requirement of
21 a performance bond or irrevocable sight draft letter of credit is not needed. (Tr. at 20) Further,
22 AGL's witness stated that because AGL is not seeking to offer switched services and AGL will not
23 have direct contact with residential customers, the lack of a performance bond would not pose a risk
24 to customers it proposes to serve. (Id.)

25 **Rates and Charges**

26 19. AGL will have to compete with various incumbent local exchange carriers ("ILEC"),
27

28 ⁹ Amended Application at (B-3).

¹⁰ Proposed Tariff, Sections 2.13.1 and 2.13.2.

1 competitive local exchange carriers ("CLECs"), and interexchange carriers ("IXC") currently
2 providing telephone services.

3 20. Staff believes that given the competitive marketplace in which AGL will be providing
4 services, AGL will not be able to exert any market power and the competitive process should result in
5 rates that are just and reasonable. (S.R. at 2)

6 21. AGL's proposed rates are for competitive services. In general, rates for competitive
7 services are not set in the same manner as for non-competitive services, although fair value rate base
8 is taken into account as part of the approval process.

9 22. According to the Staff Report, AGL will have to engage in a competitive bidding
10 process to gain new customers, which will result in customized rates to serve its proposed customers.
11 (S.R. at 3) Further, Staff believes that AGL's proposed business customers who do not need
12 customized rates will be able to purchase service at the rates proposed in AGL tariffs. (Id.)

13 23. AGL estimates that its net book value or fair value rate base after its first year of
14 operations will be approximately \$20 million.¹¹ While Staff considered AGL's fair value rate base in
15 its analysis, Staff determined that the fair value rate base information should not be given substantial
16 weight in its analysis given the highly competitive market in which AGL will operate. (S.R. at 2)

17 24. Pursuant to Arizona Administrative Code ("A.A.C.") R-14-2-1109, AGL may charge
18 rates for services that are not less than its total service long-run incremental costs of providing
19 service.

20 25. Staff believes AGL's proposed rates, as presented in its tariffs, are just and reasonable
21 and recommends that the rates be approved. (S.R. at 3)

22 **Complaint Information**

23 26. According to AGL's amended application, it has not had an application for service
24 denied in any state in which AGL has applied for a certificate to provide service. (A-11) The
25 application states that in 2002, the Missouri Public Service Commission ("MPSC") granted AGL a
26 certificate of service to provide statewide interexchange and non-switched local exchange
27

28 ¹¹ Amended Application, Attachment G.

1 telecommunications services. (A-11) AGL's witness testified that in 2004, Staff for the MPSC filed a
2 complaint and sought penalties against AGL for its failure to file a 2002 Annual Report. (Tr. at 18)
3 According to the witness, the MPSC determined that since AGL had never exercised its authority
4 under the certificate for service, Staff's complaint was denied. (Id.) Subsequently, on January 11,
5 2005, the Staff of the MPSC filed a motion requesting the MPSC find that the certificate of service
6 authority issued to AGL be deemed null and void, since AGL had not exercised its authority under
7 the certificate and AGL did not have an approved tariff in Missouri. (A-11) On February 16, 2005,
8 the MPSC issued an Order, deeming AGL's certificate null and void and finding that no penalties
9 should be assessed against AGL because AGL had filed all outstanding reports. (Id.)

10 27. According to AGL's witness, in March 2008, AGL filed a new application with the
11 MPSC for a certificate of service to provide interexchange and non-switched local exchange
12 telecommunications services and the MPSC granted AGL's application for a certificate of service.
13 (Tr. at 18) AGL's witness stated that AGL is currently in compliance with the MPSC and has filed
14 its 2008 Annual Report. (Id.)

15 28. AGL's witness testified that to avoid missing future compliance deadlines AGL has
16 implemented a contract management system that alerts AGL to all pertinent dates related to
17 regulatory filings for administrative agencies and municipalities. (Tr. at 30)

18 29. In its application, AGL disclosed information regarding a complaint filed by
19 Southwest Gas Corporation ("Southwest Gas") against the City of Tempe, AGL, Speedy Gonzales
20 Construction, Inc. ("Speedy Gonzales"), Does I-10, and Roe Corporations I-X ("Complaint").¹²
21 According to AGL, the Complaint alleges AGL's contractor, Speedy Gonzales, caused a break in a
22 24-inch water line main and Southwest Gas is seeking damages allegedly resulting from that
23 breakage. (A-12) According to the Staff Report, the Commission's Pipeline Safety Section found
24 that Speedy Gonzales followed all applicable underground facility laws and cited¹³ the City of Tempe
25 for not properly identifying the water line main in question. (S.R. at 4) AGL and Speedy Gonzales
26 have filed a cross claim and third party complaint against the City of Tempe, for its failure to
27

28 ¹² Case No. CV2008-032658 was filed in the Superior Court of Arizona on December 29, 2008. (A-12)

¹³ Pipeline Safety issued a Notice of Violation Warning to the City of Tempe.

1 properly locate and mark underground facilities and seeking damages equal to the amount requested
2 by Southwest in the Complaint. (A-12) The Complaint is still pending in Superior Court and no
3 judgment has been entered in the case. (Id.)

4 30. Staff's witness stated that Staff reviewed the compliance and complaint issues raised
5 in AGL's application and Staff does not believe the issues will negatively affect AGL's ability to
6 provide quality service in Arizona nor impair AGL compliance with Arizona rules and regulations.
7 (Tr. at 36)

8 31. Staff also reviewed information from the other jurisdictions where AGL is providing
9 service and found one other billing complaint in Georgia that had been resolved in 2007. (S.R. at 4)
10 Staff's investigation also showed no complaints had been filed by the Federal Communications
11 Commission against AGL. (Id.) The Commission's Utilities Division Consumer Services showed no
12 complaints had been filed against AGL from January 1, 2006 to present. (Id.)

13 32. According to the Staff Report, AGL is in good standing with the Commission's
14 Corporations Division. The Staff Report further states that neither AGL nor its officers, directors,
15 partners, or managers have been or are currently involved in any other civil or any criminal
16 investigations in the last ten years, other than those discussed above. (S.R. at 5)

17 33. According to Staff, "private line service is a direct circuit or channel specifically
18 dedicated to the use of an end user organization for the purpose of directly connecting two or more
19 sites in a multi-site enterprise." (S.R. at 5) Staff believes AGL's proposed services are private line
20 services.

21 34. Based on various IXCs, ILECs, and CLECs holding or having authorization to provide
22 private line services, Staff believes AGL's entry into the market will be highly competitive. (S.R. at
23 5) AGL will have no market power in those markets where alternative providers to private line
24 telecommunications services exist. (Id.) Therefore, Staff recommends that AGL's proposed services
25 in Arizona be classified as competitive.

26 35. Staff's recommendations, as set forth herein, are reasonable and should be adopted.

27 36. AGL's rates, as they appear in the proposed tariffs, are just and reasonable and should
28 be approved.

CONCLUSIONS OF LAW

1
2 1. AGL is a public service corporation within the meaning of Article XV of the Arizona
3 Constitution and A.R.S. §§40-281 and 40-282.

4 2. The Commission has jurisdiction over AGL and the subject matter of this application.

5 3. Notice of the application was given in accordance with the law

6 4. A.R.S. § 40-282 allows telecommunications company to file an application for a
7 CC&N to provide competitive telecommunications services.

8 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
9 Statutes, it is in the public interest for AGL to provide the telecommunications services set forth in its
10 application.

11 6. AGL is a fit and proper entity to receive a CC&N authorizing it to provide competitive
12 private line telecommunications services in Arizona, subject to Staff's recommendations set forth
13 herein.

14 7. The telecommunications services that AGL intends to provide are competitive within
15 Arizona.

16 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,
17 it is just and reasonable and in the public interest for AGL to establish rates and charges that are not
18 less than AGL's total service long-run incremental costs of providing the competitive services
19 approved herein.

20 9. Staff's recommendations are reasonable and should be adopted.

ORDER

21
22 IT IS THEREFORE ORDERED that the application of AGL for a Certificate of Convenience
23 and Necessity for authority to provide competitive private line telecommunications services within
24 the State of Arizona, is hereby granted subject to Staff's recommendations, as more fully described
25 hereinabove.

26 ...

27 ...

28 ...

IT IS FURTHER ORDERED that if AGL fails to comply with the Staff recommendations described in Finding of Facts Nos. 5 and 6, the Certificate of Convenience and Necessity granted herein shall be considered null and void after due process.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this _____ day of _____, 2010.

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

DISSENT

DISSENT

1 SERVICE LIST FOR: AGL NETWORKS, LLC

2 DOCKET NO.: T-20667A-09-0179

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